IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELIZABETH BELIVEAU
AND JOE BELIVEAU PLAINTIFFS

VS. CIVIL ACTION NO. 2:99CV216-B-B

HWCC-TUNICA, INC. DEFENDANT

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion to strike and its motion for summary judgment. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

On or about September 23, 1997 the plaintiffs were eating dinner in the Epic Buffet restaurant at the Hollywood Casino in Tunica, MS. Around 8:00 p.m. the plaintiff, Elizabeth Beliveau, slipped and fell. She then returned with her husband, Joe Beliveau, to their table and began eating. Thereafter, the plaintiff was approached by Sharon Turvey, a security officer for the defendant, HWCC-Tunica, Inc., and a conversation regarding Elizabeth's fall ensued. According to a written statement by Elizabeth Beliveau, the sum and substance of the accident was that she "was walking back to [her] table and slipped on something wet on the floor." *See* Security Department Written Statement, case no. C-97-09-120, dated September 23, 1997, attached as Exhibit A to the defendant's motion for summary judgment.

The plaintiffs filed this action on November 4, 1999 alleging that the defendant negligently maintained its premises in an unreasonably safe condition and that as a proximate result, Elizabeth Beliveau was injured. Further, plaintiff Joe Beliveau claimed that his wife's injury proximately caused consortium damages. The defendant has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiffs, in response to the defendant's motion for summary judgment, have offered their own signed statements as proof of the type of substance on the floor at the time of the accident and that the defendants had at least constructive notice, by statements from other patrons, that there was some substance on the floor. The defendant then moved to strike portions of the plaintiffs' statements, pursuant to Rule 801 of the Federal Rules of Evidence, as inadmissible hearsay. The plaintiffs have not responded to the defendant's motion to strike. It is the defendant's motion to strike and motion for summary judgment that are currently before the court.

LAW

A. Motion To Strike

The defendant has moved to strike portions of the plaintiffs' affidavits submitted in support of their response to the defendant's motion for summary judgment. These "affidavits" are transcribed conversations between the individual plaintiffs and their attorney, Richard Benz, which have been signed by the plaintiff and notarized. The defendant objects to specific portions of the affidavits as which reference statements or comments by one of the plaintiffs regarding what the other plaintiff, the defendant's security personnel, or unnamed customers of the Epic Buffet told that individual plaintiff regarding the incident of Elizabeth Beliveau's fall at the Hollywood Casino.[1] The defendant submits that these statements fall into the definition of hearsay set forth in Rule 801 of the Federal Rules of Evidence and are therefore inadmissible.[2] The plaintiffs have not responded to the defendant's motion to strike nor have they otherwise cited any exception to the hearsay rule under which the statements would be admissible. Therefore, the court finds that the defendant's motion to strike is well taken and should be granted.

B. Motion For Summary Judgment

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[1] The defendant specifically objects to the following statement contained within Elizabeth Beilveau's affidavit:

> I was holding on to the end of the table and a gentleman came and said to me 'I told them 10 minutes ago to clean up the mess" and then he sat down and while I was still trying to move, another gentleman came up and he said 'And I told that guy 10 minutes before he told him to clean it up. They've been told twice to clean that up.' And he said 'And now somebody's gotten hurt on it.'

And to the following from Joe Beliveau's Affidavit:

> "Elizabeth says that she told her that it was, it was butter."

[2] Federal Rule of Evidence 801 defines hearsay as follows:
Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the non-moving party's case"). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to a party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue of material fact exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Cor., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

Under Mississippi law, a business owner or operator owes a duty to an invitee to keep its premises in a reasonably safe condition. Drennan v. Kroger Co., 672 So.2d 1168, 1170 (Miss. 1996). Notwithstanding, the owner or occupant is not an insurer against all injuries. Kroger, Inc. v. Ware, 512 So. 2d 1281, 1282 (Miss. 1987). Where a dangerous condition is created by someone not associated with the operation of the business, the plaintiff must produce evidence demonstrating that the operator had actual or constructive knowledge of the condition in order to prove liability. Downs v. Choo, 656 So. 2d 84, 86 (Miss. 1995). Constructive knowledge is present where, based on the length of time that the condition existed, an operator exercising reasonable care should have known of its presence. Waller v. Dixieland Food Stores, Inc., 492 So. 2d 283, 285 (Miss.1986). It is not enough for a plaintiff to simply prove that there was a foreign substance on the floor that caused him injury. Instead, the plaintiff must show that the owner or operator either created the condition, in the instant case of the substance on the floor, or that the owner or operator should have known of the existence of the condition in time to correct it. Id.

In the case at bar, the plaintiffs allege that the substance on the floor was probably butter from the snow crab leg butter bowl on the buffet. The defendant has submitted unrebutted deposition testimony that at the time of the accident there was no butter on the buffet for the snow crab legs and that if a guest requested butter it was brought to them at that time. *See* deposition of Charlie Brown, p.7, lines 20 - 25 through p.8, lines 1- 5, attached as Exhibit G to the defendant's motion for summary judgment. However, assuming that the foreign substance was determined to be butter, the plaintiffs have not presented evidence of how the substance came to be on the floor or for how long it was on the floor. Therefore, finding that the plaintiffs have failed to establish that the condition was caused by the defendant or that it was known by the defendant in time to correct it, the court holds that the plaintiff has failed to show a genuine issue of material fact regarding her claim of premises liability and that the defendant is entitled to judgment as a matter of law.

C. Joe Beliveau's Claim of Consortium Damages

As Mr. Beliveau's claims for consortium damages stands or falls with his wife's claim, the defendant is entitled to summary judgment as to his claims as well. Overstreet v. The Water Vessel "Norkong", 706 F.2d 641, 644 (5th Cir. 1983); McCoy v. Colonial Baking Co., 572 So. 2d 850, 853-54 (Miss. 1990) (When a loss resulting from injury to a person may be recovered by either the injured person or another person [e.g., for loss of consortium], a judgment against the injured party has preclusive effects on any such other person's claim.).

CONCLUSION

For the forgoing reasons, the court finds that the defendant's motion to strike and their motion for summary judgment should be granted. An order shall this day issue accordingly.

THIS, the ____ day of September, 2000.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

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ORDER

In accordance with the memorandum opinion this day issued, it is **ORDERED**:

That the defendant's motion to strike is **GRANTED**;

That the defendant's motion for summary judgment, is **GRANTED**; and

That this cause is **DISMISSED with prejudice**.

THIS, the ____ day of September, 2000.

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NEAL B. BIGGERS, JR.
CHIEF JUDGE